Campbell Cheong Chan (M) Sdn Bhd v Ayyawoo a/l Nadeson

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R3–25–68 OF 1998
NIK HASHIM J
30 DECEMBER 1998

Labour Law *— Employment — Termination of service — Dismissal — Test for constructive dismissal — Wrong test applied by Industrial Court — Employer requested employee to vacate room and relocate to general office area — Whether employer was guilty of breach going to root of contract — Whether employer had evinced intention no longer to be bound by contract*

The respondent was employed as a financial controller with Cheong Chan (Hup Kee) Sdn Bhd on 4 July 1994. Upon entering a joint venture agreement with an American company, Cheong Chan (Hup Kee) Sdn Bhd became Campbell Cheong Chan (M) Sdn Bhd ('the applicant'). The applicant then appointed the respondent to the same position as financial controller. The appointment letter provided that the respondent's terms and conditions of employment shall remain unchanged. On 28 June 1996, the applicant issued a letter to the respondent informing him that: (i) his position had been redesignated to accounting manager; (ii) he was to vacate his room; and (iii) the car ('the Volvo 740') he was using would be replaced. The respondent did not agree with the new arrangement and wrote to the applicant. He did not receive a reply and wrote a second letter stating that he considered the redesignation entirely wrong and not acceptable as it reflected a move to humiliate him. The respondent claimed that he had been constructively dismissed and that the dismissal was without just cause or excuse. The chairman of the Industrial Court found in the respondent's favour and awarded 16 months backwages and compensation of three months' salary in lieu of reinstatement. It was contended on behalf of the applicant that the Industrial Court had applied the wrong test in determining whether there was constructive dismissal and had failed to determine whether or not the applicant had committed a fundamental breach of contract. As a result, the award was erroneous. The applicant applied for an order of certiorari to quash the Industrial Court award.

Held, dismissing the application:

(1) The redesignation of the respondent from financial controller to accounting manager, which led to the deprivation of the room and the Volvo 740 was clearly a demotion which resulted in a fundamental breach of the respondent's employment contract by the applicant. Thus, the respondent was entitled to plead constructive dismissal and the dismissal was without just cause or excuse. As it was not in the parties' interest to order reinstatement, the respondent was paid compensation for loss of employment (see p 18E–G).

(2) The Industrial Court's finding on the demotion — justified on the evidence before it — was based on the contract test and the respondent's immediate action in protesting the change was consistent with the criterion required under the contract test (see p 17C–H); *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 91 and *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 followed.

(3) The respondent had a right to terminate his contract of service and therefore to consider himself as discharged from further obligations where the employer was guilty of a breach so fundamental as going to the root of the contract or where the employer had evinced an intention not to be bound by the contract any longer. The finding of the respondent's demotion was sufficient to warrant the respondent's claim to consider himself dismissed as it was a clear breach of contract by the applicant which deprived the respondent of his proprietary right to earn a living (see p 16A–H).

[Bahasa Malaysia summary

Responden telah bekerja sebagai pegawai kawalan kewangan dengan Cheong Chan (Hup Kee) Sdn Bhd pada 4 Julai 1994. Setelah membuat perjanjian usaha sama dengan sebuah syarikat Amerika, Cheong Chan (Hup Kee) Sdn Bhd telah bertukar nama menjadi Campbell Cheong Chan (M) Sdn Bhd ('pemohon tersebut'). Pemohon tersebut kemudiannya telah melantik responden ke jawatan yang sama sebagai pegawai kawalan kewangan. Surat perlantikan responden memperuntukkan terma dan syarat perkhidmatan yang sama. Pada 28 Jun 1996, pemohon menyerahkan surat kepada responden memberitahu bahawa: (i) jawatannya telah diubah kepada pengurus akaun; (ii) dia dikehendaki mengosongkan bilik; dan (iii) kereta yang dipakainya ('Volvo 740') akan diganti. Responden tidak bersetuju dengan peraturan yang baru dan menulis surat kepada pemohon. Beliau tidak menerima sebarang balasan dan menulis surat untuk kali kedua menyatakan bahawa beliau menganggap rombakan tersebut adalah salah sama sekali dan tidak dapat menerimannya kerana ia merupakan satu tindakan untuk memalukannya. Responden mendakwa bahawa beliau telah dipecat secara konstruktif dan pemecatan tersebut telah dibuat secara tidak adil atau tanpa sebarang alasan. Pengerusi Mahkamah Perindustrian berpihak kepada responden dan memberikan 16 bulan gaji ke belakang dan ganti rugi tiga bulan gaji sebagai ganti memberikan semula jawatan tersebut. Pihak pemohon berhujah bahawa mahkamah telah menggunakan ujian yang salah dalam menentukan sama ada wujudnya pemecatan konstruktif dan juga gagal untuk menentukan sama ada pemohon telah melakukan pecah kontrak asasi. Akibatnya, award tersebut adalah salah. Pemohon memohon perintah certiorari untuk mengenepikan award Mahkamah Perindustrian.

Diputuskan, mengetepikan permohonan:

(1) Perubahan jawatan responden daripada pegawai kawalan kewangan kepada pengurus akaun, yang membawa kepada perlucutan hak ke atas bilik dan kereta Volvo 740 secara jelas merupakan suatu turun pangkat yang membawa kepada pemecahan kontrak perkhidmatan asasi responden oleh pemohon. Oleh itu, responden berhak untuk memplidkan pemecatan konstruktif tersebut dan pemecatan secara tidak adil dan tanpa alasan. Oleh kerana adalah bukan untuk kepentingan pihak-pihak berkenaan untuk memerintahkan pengembalikan semula jawatan tersebut, responden dibayar ganti rugi kerana hilang jawatan (lihat ms 18E–G).

(2) Penemuan Mahkamah Perindustrian mengenai turun pangkat — yang disoking oleh keterangan yang ada — adalah berdasarkan ujian kontrak dan tindakan segera responden dalam membuat bantahan ke atas perubahan yang dibuat selaras dengan kriteria yang diperlukan di bawah ujian kontrak (lihat ms 17C–H); *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 91 dan *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 diikut.

(3) Responden mempunyai hak menamatkan kontrak perkhidmatan dan dengan itu menganggap beliau telah terlepas daripada obligasi kontrak sekiranya majikan telah didapati bersalah melanggar kontrak asasi sehingga ke akar umbi kontrak tersebut atau di mana majikan memperlihatkan niat untuk tidak diikat dengan kontrak tersebut lagi. Penemuan mengenai turun pangkat jawatan responden adalah mencukupi untuk mewajarkan tuntutan responden untuk menimbangkan pemecatan beliau oleh sebab ia dengan jelas memperlihatkan pemecahan kontrak oleh pemohon yang telah manafikan responden haknya untuk sara hidup (lihat ms 16A–H).]

Notes

For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 840–847.

Cases referred to

Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137 (refd)

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599 (folld)

Holiday Inn, Kuching v Lee Chai Siok Elizabeth [1992] 1 MLJ 230 (refd)

Talasco Insurance Sdn Bhd v Industrial Court of Malaysia & Anor [1997] 4 CLJ 97 (refd)

A *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 91 (folld)

Legislation referred to

Industrial Relations Act 1967 s 30(5)

B

TM Varughese (*TM Varughese & Co*) for the applicant/company.
M Manogaran (*Mano & Co*) for the respondent.

Cur Adv Vult

C **Nik Hashim J**: This is an application by Campbell Cheong Chan (M) Sdn Bhd ('the company') for an order of certiorari to quash the Industrial Court award No 310 of 1998 which held that the respondent was constructively dismissed and the dismissal was without just cause or excuse, and awarded 16 months backwages (RM178,480) and compensation of three months salary (RM33,465) in lieu of reinstatement.

D The respondent commenced work as financial controller with Cheong Chan (Hup Kee) Sdn Bhd on 4 July 1994. Cheong Chan (Hup Kee) Sdn Bhd entered into a joint venture agreement with Campbell Soup Co of the United States of America and on 1 December 1995, the company, Campbell Cheong Chan (M) Sdn Bhd came into being. The company then vide a letter of appointment dated 1 December 1995 appointed the E respondent to the same position as financial controller at a salary of RM10,500 per month. This appointment letter (AN-1) provides that the respondent's terms and conditions with Cheong Chan shall remain unchanged. Paragraph 2 in the said letter states:

> F Your job duties remain unchanged and as was the case with Cheong Chan previously, the present management may vary your job specifications if the need arises.

On 1 February 1996, the respondent's salary was increased to RM11,155 per month as recognition for his valuable contribution over the past year.

G On 28 June 1996, the company issued a letter (AN-4) to the respondent to tell him that his position has been redesignated from financial controller to accounting manager, to vacate his room and he will be placed in the general office area and that the Volvo 740 which the respondent was using is to be replaced with a 2 liter car. The letter reads:

> Campbell Cheong Chan (M) Sdn Bhd
>
> H 28 June 1996
>
> Ayyawoo s/o Nadaeson
> 14 (Lot 2487) Happy Garden Tambahan
> Kuala Lumpur
>
> Dear Mr Ayyawoo,
>
> I 1.0 Since the start up of our joint venture and the formation of this new company, we have been re-organizing the business structure as required by the new corporate direction and needs.

2.0 Effective immediately, your position had been redesignated to accounting manager reporting to Mr Somasundaram the finance controller/director. Your duties and responsibilities include:

(a) petty cash management;

(b) reconciliation of balance sheet accounts;

(c) preparing sales tax returns and confirming amounts payable;

(d) reviewing of accounting system operating in the branches;

(e) physical verification of stock;

(f) rendering services to the associated companies, and

(g) any other duties that may be assigned by your superior from time to time.

3.0 Your basic salary remains unchanged.

4.0 Due to space constraints in the office, it is the management policy that the four rooms in the administration office are assigned to directors only. As such, you will be required to vacate the room by 2 July 1996 and a desk will be allocated to you in the general office area.

5.0 In accordance with the terms and conditions of your employment and to be consistent with the terms of employment, the company will provide you with a two (2) litre car in replacement of the Volvo 740 that you are currently using effective 2 July 1996.

6.0 All other terms and conditions of your employment not mentioned herein shall remain unchanged.

Yours sincerely,

(Sgd)
Michael Wong
Managing Director

The respondent did not agree with the new arrangement and wrote a reply on 1 July 1996 requesting that he be put back in his previous position with no changes with immediate effect. The company did not reply to the respondent's letter. The respondent wrote another letter dated 3 July 1996 which is reproduced as follows:

Campbell Cheong Chan (M) Sdn Bhd
36, Jalan Penchala,
46700 Petaling Jaya,
Selangor Darul Ehsan.

Attention: Mr Michael Wong

Dear Sir,

I refer to your letter dated 28 June 1996 and my reply to you dated 1 July 1996. As you have not replied my letter and reinstated me to my original position as per the terms of employment dated 1 December 1995 and 4 July 1994, I take it that you have unilaterally varied the terms of employment. I also repeat that I do not agree to the new terms set out in your letter dated 28 June 1996.

I would also like to state that besides not agreeing to the terms of your letter dated 28 June 1996, I find that para 2.0 is vague and does not appear to

A be the responsibilities of a financial controller. I also consider the redesignation from financial controller to accounting manager entirely wrong and not acceptable.

In reference to para 4.0 of your letter I find that the act of removing me in the general office area, I believe, it is clearly to humiliate me. I find this is totally unacceptable as this does not reflect a financial controller's position.

B It is also strange that you have in para 5.0 chosen to be consistent with the terms of employment whereas elsewhere in the letter you have acted contrary to the terms.

I find the redesignation, the relocation from my office to the general office and others mentioned in your letter is clearly against the terms of employment and further will put me in a very embarrassing position. As such I am forced C to tender my resignation with immediate effect. Further, your letter dated 28 June 1996 is in breach of the terms of employment.

Yours faithfully,

(Sgd)

D Ayyawoo s/o Nadaeson
cc Human Resource Manager

After evaluating both sides of the case, the learned chairman at the end of the award at p 99 of record, made the following findings:

E It is the finding of this court that the change of position from financial controller to accounting manager is a change from superior position to an inferior position which resulted in the claimant (respondent) giving up his room and the Volvo car was a demotion. The claimant (respondent) was therefore entitled to plead constructive dismissal and the dismissal was without just cause or excuse.

F As to the remedy prayed for this court is of the view that it is not in the interest of the parties to order reinstatement. There is evidence the claimant (respondent) and COW-4 could not get on well. The court orders that the claimant (respondent) be paid compensation for loss of employment.

Mr TM Varughese for the company argued that the Industrial Court was wrong for applying the 'unreasonableness test' instead of the 'contract test' G in determining whether there was constructive dismissal in the case. In making the award, the Industrial Court failed to make specific finding on whether or not the company had committed a fundamental breach of the contract. Thus, counsel submitted that failure to apply the correct test and to make the specific finding renders the award erroneous which may be H quashed by certiorari.

Mr M Manogaran, for the respondent, in opposing the application, contended that the Industrial Court had applied the correct contract test when it made the finding that the respondent was demoted from financial controller to accounting manager. This was evidenced by the company's letter (AN-4 at p 40 of encl 3) which changed the respondent's position, I thereby breaching the respondent's earlier contract of employment vide letter (AN-1 at p 44 of encl 3) which appointed him as the financial controller.

Having taken into consideration that have been said by both counsel, it is my judgment that there is much merit in Mr M Manogaran's contention. A

The Industrial Court's finding on the demotion was based on the contract test. The evidence before the Industrial Court justified that finding. In the present case, the respondent immediately on 1 July 1996 protested to the company of the change and asked the company to put himself back to his previous position with immediate effect. When there was no response from the company, he issued another letter on 3 July 1996 (at p 46 of encl 3) to consider himself dismissed. Thus, the immediate action taken by the respondent protesting the change is consistent with the criterion that is required under the contract test. Further, the respondent had pleaded fundamental breach in his statement of case (para 8 at p 33 of cncl 3). There was also submission by the company's counsel on 'contract test' before the Industrial Court (p 10 of award). Therefore, the failure on the part of the Industrial Court to make a specific finding that the company had committed a breach of contract which goes to the fundamental terms of the contract, to my mind, is a mere technicality, which does not render the award erroneous in law. The evidence before the Industrial Court clearly shows that the company has breached the terms of employment. The demotion from financial controller to accounting manager was indeed a breach of the contract which resulted the respondent losing the Volvo 740 car and the room. It is a fact that the company vide letter AN-1, offered the respondent the post of financial controller whereby the respondent accepted the offer and continued his duties until 28 June 1996 when AN-4 was issued. Obviously, this letter is in breach of the terms of employment. It is clear from AN-4 that the company has shown that it no longer had any intention to be bound by AN-1. Though the company may vary the respondent's job specifications if the need arises as provided for under AN-1, the company cannot simply change the appointment, as the appointment of the respondent as financial controller in the company is the basis of the appointment. Moreover, the job functions mentioned in AN-1 hardly reflect those of a financial controller. Even the company's own witness, COW-4, who became the finance controller/director as a result of this change, had admitted in his testimony that in the accounting field the positions of financial controller and accounting manager are not the same and that the accounting manager is subordinate to financial controller (p 25 of encl 4). Thus, the redesignation from financial controller to Accounting Manager, which led to the depriving of the room and Volvo 740 car, is a chain of events which resulted in the fundamental breach of the contract by the company. Since the respondent did not agree to the change, the company could not vary the designation from a superior position to an inferior one. Accordingly therefore, the respondent was entitled to regard the contract as terminated and to resign. B C D E F G H

In *Wong Chee Hong v Cathay Organization (M) Sdn Bhd* [1988] 1 MLJ 91, the Federal Court held: I

> ... the common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as

> affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer ... .

This 'contract test' has been consistently followed by our courts (see the High Court case in *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230 and the Court of Appeal case in *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599). Mahadev Shankar JCA (delivering the judgment of the court) in *Anwar*'s case at pp 605–606 said:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'.

Thus, the finding of demotion is sufficient to warrant the respondent's claim to consider himself dismissed as the terms of the contract in AN-1 have been breached by AN-4. The breach was so fundamental as to go to the root of the contract.

The company's counsel complained that the learned chairman had applied the 'unreasonableness test' when he used the phrases such as 'justifiable to request' and 'judged reasonably and sensibly' at pp 12 and 13 of the award. And according to counsel, it was the wrong test. On perusal, I find there is no basis for the complaint. The learned chairman used the words only to describe the conduct of the company in respect of the car and the room, and not on the demotion. It is to be noted that after AN-4 was issued, the Volvo 740 car was given to the sales manager. As such, there is nothing wrong for the Industrial Court to use the said phrases as the Industrial Court is only bound to decide on the substantial merits of the case without regard to technicalities and legal form (s 30(5) of the Industrial Relations Act 1967). With respect, I agree with the respondent's counsel that the company had wrongly deduced that the Industrial Court by mere usage of such phrases, had applied the 'unreasonableness test'. The principle of 'unreasonableness test' was applied by the Court of Appeal in *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137. I understand *Ang Beng Teik* is on appeal before the Federal Court. In the light of the present authorities and until *Ang Beng Teik* is affirmed by the Federal Court, I would prefer to follow *Wong Chee Hong*'s 'contract test'.

The Industrial Court's decision is not based on the company's unreasonable behaviour but on the basis that the company had breached the contract when the position was changed from that of financial controller to accounting manager. Thus, the Industrial Court had correctly used the 'contract test' when it said:

> ... the change of position from financial controller to accounting manager is a change from a superior position to an inferior position which resulted in the claimant giving up his room and the Volvo car was a demotion ... .

It is the company's argument that the company did not commit any fundamental breach of contract in the redesignation, as it was the

company's prerogative to decide over the matter and loss of pride does not constitute constructive dismissal. Counsel quoted the High Court case of *Talasco Insurance Sdn Bhd v Industrial Court of Malaysia & Anor* [1997] 4 CLJ 97 in support of his argument.

In that case, as a result of reorganization, the claimant's designation was changed from chief accountant to accountant and was required to report to a newly recruited senior manager, finance and administration instead of previously reporting to the general manager. He was also asked to move into a smaller room. The Industrial Court ruled that the claimant was constructively dismissed without just cause or excuse and ordered compensation. Abdul Kadir Sulaiman J quashed the award and ruled that the conduct of the company in carrying out the reorganization exercise had not in any way deprived the employee of his proprietary right to earn a living and loss of pride alone would not constitute a dismissal of the employee.

In my view, the facts in *Talasco* are not similar and therefore inapplicable to the instant case. In our case, the respondent was moved to the general office area and not to a smaller room. The chief accountant in *Talasco* left the job immediately when a new senior officer was appointed with whom the claimant disagreed. In the present case, the respondent continued working for more than six months from 1 December 1995 to 28 June 1996 when AN-4 was issued. COW-4, who was then the finance director, was already in employment on 1 December 1995. The respondent accepted COW-4. But on 28 June 1996 COW-4 became the finance controller in addition to being finance director. On the facts of this case, I agree with the learned chairman's decision that the respondent was entitled to plead constructive dismissal and that the dismissal was without just cause or excuse.

Looking at the award, it is clear that the Industrial Court did not misdirect itself in law and was right in its conclusion that the change of position was a demotion. This is not a case of loss of pride but a clear breach of contract by the company which deprived the respondent of his proprietary right to earn a living. Therefore, I cannot see how the Industrial Court's award could be opened for quashing by the High Court.

In the event, I dismiss the application with costs.

Application dismissed.

Reported by Wong Siok Chin